

BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)
NATONAL DISTRIBUTION)
vs.)
COMMONWEALTH EDISON COMPANY,)
Complaint as to overcharging) No. 01-0306
and failure to honor previous)
settlement agreement in)
Chicago, Illinois.)
Chicago, Illinois
May 2nd, 2002

Met pursuant to notice at 2:00 p.m.

BEFORE:

MR. SHERWIN ZABAN, Administrative Law Judge

APPEARANCES:

MS. FELICIA FRANCO-FEINBERG
10 South Dearborn, 35th Floor
Chicago, Illinois 60603
Appearing for Commonwealth Edison Company;

1 APPEARANCES (Continued)

2 MR. ROBERT HABIB
3 134 North LaSalle Street, Suite 516
4 Chicago, Illinois 60602
5 Appearing for National Distribution;
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17 SULLIVAN REPORTING COMPANY, by
18 Barbara A. Perkovich, CSR
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I N D E X

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Witnesses:Direct Cross direct cross Judge

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None.

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NumberFor IdentificationIn Evidence

None.

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1 JUDGE ZABAN: By the power invested in me by the
2 Illinois Commerce Commission I now call Docket No.
3 01-0306, National Distribution versus Commonwealth
4 Edison.

5 Would the parties please identify themselves
6 and enter their appearances.

7 MR. HABIB: Robert Habib, I'm the attorney from
8 National Distribution, we are the complainant.

9 MS. FRANCO-FEINBERG: On behalf of Commonwealth
10 Edison Company, Felicia Franco-Feinberg, Exelon
11 Business Services, 10 South Dearborn, Floor 35,
12 Chicago, Illinois 60603. Also here with me is
13 Mr. Bob Jacobs with Com Ed.

14 JUDGE ZABAN: Okay, for the record, I've just
15 been recently assigned this matter. I've had an
16 opportunity to examine the file. Apparently there
17 have been a number or a couple deadlines for
18 discovery. The discovery is still ongoing; is that
19 correct?

20 MS. FRANCO-FEINBERG: No, discovery closed, your
21 Honor, January 18th of 2002.

22 JUDGE ZABAN: Okay. That's -- but I also

1 understand that since that time that Mr. Habib, you
2 have discovered other things that were not --

3 MR. HABIB: I have discovered other matters that
4 -- because in their response to their direct
5 testimony, at this point, the first time learned
6 that the two employees who had negotiated the
7 agreements with us, at this point are no longer
8 employed by them. So upon doing so I immediately
9 propounded interrogatories asking where these
10 employees were.

11 They did respond to these interrogatories, by
12 stating in effect that they gave me the last date of
13 employ of, I believe it was March 25th, 2002, which
14 was very recent. But they further stated that they
15 would not tell us the last known addresses or phone
16 numbers of these former employees. And they further
17 stated at this point that they would not state the
18 reasons as to why these two employees suddenly left
19 the company.

20 In all honesty, last night I received an an
21 amendment to the interrogatories, I think it was
22 yesterday, that they sent over amendments stating

1 that actually these employees had not left the
2 company on March 25th, 2002, they had left the
3 company, I think, several months earlier, if I
4 recall from reviewing it.

5 I then filed the motion to compel at this point
6 on the grounds that I'm entitled to know, especially
7 this is critical at this point, because if it does
8 go -- when it does go to trial I'm going to have to,
9 obviously, at this point, rather than simply demand
10 that Commonwealth Edison produce these employees,
11 I'm going to have to subpoena them in on my own.

12 And also obviously I would like to talk to them
13 beforehand because I was kind of stunned when I saw
14 their response to our direct testimony in which
15 basically they avoided responding at all, at least
16 in my opinion, to the admission of facts and
17 basically talked about everything else.

18 However, that situation was superseded because
19 yesterday or two days ago, I should say, my client
20 received corrected bills for at least one of the
21 years in question, in which it had been our position
22 throughout, as set forth in the direct testimony,

1 that if they had actually calculated our bills
2 correctly we would have been averaging about 12,
3 \$1300 a month.

4 And yesterday, the bill was actually issued
5 April 19th, but it came to my client's attention
6 because I know he was out of town for several days,
7 yesterday morning, and he got it over to me
8 yesterday that they gave us \$13,000 and 5 or \$600 at
9 this point, and in effect went back to the position
10 we had taken that our bill should have averaged only
11 12 to 1300 a month, rather than the \$4,000 a month
12 that they were hitting us with.

13 And therefore as soon as I got these bills, I
14 got them last night, and then this morning on the
15 train I dictated a motion and sent it over to
16 counsel, and I got it over to her before the
17 hearing. Actually I got it over to her two hours
18 later that I said I was because there was a mistake
19 in my office, for new discovery based on the newly
20 corrected bills. Because in effect suddenly we were
21 being told we were right all along on the last year
22 at this point, as far as what our bills should have

1 been.

2 And you know, quite frankly, their billing
3 analyst, I would like to find out how in the world
4 it was decided that over the last year, at this
5 point, our bills should have been the 12 or \$1300.
6 We thought they should have been, all along, going
7 back to the beginning of 2000, while they have yet
8 to correct the bills for 1998 and 1999 when they
9 were averaging, in our opinion, three to four times
10 of what they should have averaged at this point.

11 So in effect there are three motions before the
12 court today. One motion is dated sometime back, and
13 that was -- I had filed the motion for an extension
14 of time to comply with discovery at this point
15 because I had been -- there had been a
16 misunderstanding between my client and I as to the
17 existence of these canceled checks, and upon
18 realizing that they were there, I filed a motion
19 telling counsel that they weren't, and when I say
20 counsel, I mean Mr. Richard Bernet. When I
21 discovered they were I quickly called him up and
22 said, hey, I am going to send you over these checks

1 at this point, and did file a motion for extension
2 of time to comply with discovery and did send over
3 the discovery materials which counsel had requested.

4 So this motion shows it was docketed April 5th,
5 2002, but it was actually sent over and filed
6 sometime before that because when the clerk received
7 my original motion they called me and up and they
8 said, you didn't send us the original motion with a
9 signature, and they made me resend another motion to
10 them at this point.

11 I also have a motion to compel, and that's in
12 regards to the answers to interrogatories, that I
13 see no reason why Commonwealth Edison should not be
14 required at this point to produce the names and the
15 last address, phone number, et cetera of their last
16 two employees. And as to why these employees at
17 this point are no longer with Commonwealth Edison.

18 And the third thing I brought, and this is the
19 new motion that just came up in the last 24 hours,
20 as I've stated to the court at this point, and that
21 is the motion for additional discovery because of
22 newly received corrected bills. Because counsel and

1 I happened to meet this morning on another matter
2 and we had a discussion, as I stated, both my client
3 and I were somewhat flabbergasted is the best way to
4 describe it, by the developments yesterday when we
5 were suddenly told after all this fighting that we
6 had been right all along on the bills for 2000 and
7 2001.

8 And we were at a loss as to understand how
9 Commonwealth operates at this point and now how they
10 can inform us that -- it's nice to know they are
11 giving us the credit and they are agreeing with us,
12 but we are still trying to understand what basically
13 went on that suddenly we got a credit adjustment out
14 of the blue.

15 JUDGE ZABAN: Okay, Ms. Feinberg.

16 MS. FRANCO-FEINBERG: Certainly, your Honor.
17 First of all we did fax over to Judge King this
18 morning Commonwealth's Edison response, which was
19 filed with the Commission to National's motion to
20 compel. I'm not certain if you got a copy of that.
21 We were not aware of the change in judges.

22 JUDGE ZABAN: I don't know if it was

1 actually -- can I see a copy?

2 MS. FRANCO-FEINBERG: I apologize, I only have
3 my copy, I don't know if you would like us to
4 briefly summarize that.

5 JUDGE ZABAN: Yeah.

6 MS. FRANCO-FEINBERG: Certainly, we will provide
7 you with a copy as well. Mr. Habib laid out three
8 motions, I'm going to turn first to the motion to
9 compel regarding interrogatories. As Com Ed
10 indicated in its response, National Distribution's
11 complaint was filed a year ago April 2001. There
12 was a nine month discovery period in which National
13 propounded absolutely no discovery to Com Ed.

14 As we've indicated, these employees left the
15 employment of Com Ed about six to seven months ago.
16 If at any time National had inquired about their
17 position or what had occurred, it could have gained
18 this information. This is basically an attempt to
19 improperlyly reopen discovery, and you can see the
20 slippery slope we find ourselves in now.

21 There was ample opportunity for him to discover
22 whatever information he wanted and he didn't provide

1 a single discovery request to Commonwealth Edison
2 until basically it was time for him to file his
3 rebuttal testimony within days.

4 MR. HABIB: Can I just reply?

5 MS. FRANCO-FEINBERG: I think that's regarding
6 the discovery deadline.

7 JUDGE ZABAN: Let me ask you a question. It
8 seems to me that a lot of this case hinges around
9 two things. One, whether these employees actually
10 made an agreement with National Distribution, is
11 that -- do you both agree on that?

12 MR. HABIB: Yes.

13 MS. FRANCO-FEINBERG: Yes.

14 JUDGE ZABAN: And the second thing is if in fact
15 they did make an agreement with National
16 Distribution, whether or not they had real or
17 apparent authority to make it; is that correct?

18 MS. FRANCO-FEINBERG: I think that potentially
19 is an issue as well.

20 JUDGE ZABAN: I think that may be the issue.
21 Because in fact if they had made an agreement and
22 they had apparent or even real authority, because

1 then you are kind of stuck with what they have done,
2 unless you can show some extenuating circumstances.
3 So it seems to me that these employees are crucial.

4 MS. FRANCO-FEINBERG: Well, your Honor there is
5 no indication that national has made any effort to
6 independently obtain their whereabouts. Com Ed, as
7 we indicated in our response, deems both the last
8 known address and phone number, as well as reasons
9 for termination to be confidential and sensitive
10 employee information, which it should not disclose.

11 JUDGE ZABAN: I agree with you as to the reason
12 of termination. I think that's something purely
13 between Com Ed and its employees. But I will also
14 say this: If I turn around and say Mr. Habib you are
15 not entitled to the reason for termination, and then
16 in some subsequent time Mr. Habib finds these people
17 and they come in and testify, I'm also not going to
18 allow you to use that as a basis for impeachment.

19 In other words, to show that they have some
20 particular motive or some particular --

21 MS. FRANCO-FEINBERG: Well, I think that Com Ed
22 would indicate that if Mr. Habib or National

1 Distribution is able to contact Com Ed's former
2 employees and they are willing to disclose that
3 information, that would be the appropriate way for
4 him to obtain that information.

5 JUDGE ZABAN: Right. And I think that's
6 something they have to disclose, and not you.
7 However, I don't see a problem with giving him a
8 name, an address and a phone number. These people
9 are in the lawsuit, and as a result of being in the
10 lawsuit, they are subject to the same things as
11 everybody else.

12 If they were employees, and he asked you for a
13 way to contact them, and still employed by you and
14 asked you for a way to contact them, I would compel
15 you to do that as well. Just as if Mr. Habib had
16 somebody that you wanted to get in touch with I
17 would compel him to provide you with the
18 information. So I'm going to ask you that I think
19 you have to reveal the names and the last known
20 addresses.

21 If they refuse to talk to Mr. Habib or
22 cooperate with Mr. Habib, that's their choice and

1 then Mr. Habib can take the proper action as it
2 deals with the employees. However, I am not going
3 to compel you to give the reasons why they have been
4 terminated, that's something personal. If they
5 choose to discuss that with Mr., Habib then that's
6 their choice, but they don't have to.

7 Now, let's talk about the extension of time.
8 All right, what do you owe them at this point in way
9 of discovery?

10 MR. HABIB: I owe them nothing.

11 MS. FRANCO-FEINBERG: I think we disagree.

12 JUDGE ZABAN: What does he owe you?

13 MS. FRANCO-FEINBERG: As I understand there is
14 an affidavit that Judge King ordered you to provide
15 that has not yet been provided.

16 JUDGE ZABAN: You have three days to provide
17 that affidavit. Actually I'll give you until
18 Tuesday.

19 MS. FRANCO-FEINBERG: And, your Honor, Com Ed is
20 willing to provide, in light of the order requiring
21 us to reveal the last known addresses and phone
22 numbers of the two employees, we are willing to

1 provide it by the close of business tomorrow to Mr.
2 Habib.

3 JUDGE ZABAN: I'll give you until Tuesday, okay.
4 Fair is fair.

5 MS. FRANCO-FEINBERG: I think we are ready to
6 move on and we don't want to there to be any reason
7 for further delay.

8 JUDGE ZABAN: Now, let's talk about the
9 additional discovery. And I think this all centers
10 around why the bill was changed; is that correct?

11 MS. FRANCO-FEINBERG: Your Honor, if I may, Com
12 Ed is actually willing to provide some information
13 to Mr. Habib. However, he didn't contact us, just
14 made the motion. We are willing, to the extent that
15 any documents exist relating to the most recent
16 credit adjustment in the amount of approximately
17 14,000 pertaining to the 2000 bills, we are willing
18 to provide that documentation to the extent it
19 exists.

20 JUDGE ZABAN: Why don't you do that.
21 Mr. Habib, take a couple of days to look at it, I'm
22 going to set a very short status date to make sure

1 all this has been complied with so we can get on
2 with it. Let me set a date for two weeks, that will
3 give you enough time to provide him with names,
4 Mr. Habib can contact these people within that two
5 week period, and we can see exactly where we are.

6 Is morning or afternoon better for everybody?
7 I don't have a preference.

8 MR. HABIB: May 16th I'm in Indiana, May 17th,
9 I'm free in the afternoon.

10 MS. FRANCO-FEINBERG: I have hearings both 16th
11 and the 17th, but I'm free earlier that week.

12 JUDGE ZABAN: How about the 14th?

13 MR. HABIB: What time, your Honor?

14 JUDGE ZABAN: Whatever is convenient for
15 everybody, I'm here all day.

16 MR. HABIB: The best time -- what is the
17 earliest time we can do this?

18 JUDGE ZABAN: 10:30 or 10:00, if I really feel
19 I'm in a good mood.

20 MR. HABIB: All right. I can do it at 10:30 on
21 the 15th for status, so just to review the orders.

22 MS. FRANCO-FEINBERG: Your Honor, I think there

1 is an additional issue that Com Ed would like to
2 raise, if I may, at this time. If I indicated there
3 was a clear discovery deadline, it appears that
4 recently we are facing an onslaught of untimely
5 belated discovery, including requests for admission
6 of facts.

7 Com Ed, just to be clear for the record, did
8 not simply respond to the interrogatories, but in
9 fact objected vehemently that they were untimely,
10 coming three months after the discovery deadline,
11 but didn't want there to be any delay in this
12 proceeding so basically responded to the
13 interrogatories.

14 We do not feel that we should have to continue
15 to respond to unlimited discovery, including
16 requests for admissions of facts that could have
17 been made during the nine months. And we would
18 request, in light of the Commission's rules that
19 require Com Ed to respond in 28 days, or that they
20 be deemed to be stricken, that there be an order not
21 requiring Com Ed to respond.

22 MR. HABIB: If I could respond. There was a

1 reason for -- when you in effect stated in your
2 testimony they were no longer employed by you, and
3 to protect myself in the event I can't find these
4 people. And this is where the request for
5 admissions -- I sent you the request for admissions
6 of fact at this point because basically what they
7 set forth in the request for admissions of fact
8 is --

9 JUDGE ZABAN: When do you have to respond --
10 when do you have to respond to the admissions of
11 fact?

12 MS. FRANCO-FEINBERG: I haven't done the
13 calculation, but I think it might be before the next
14 hearing date.

15 JUDGE ZABAN: I'm going to grant you an
16 extension until at least the 16th. One of the
17 things -- but things like admitting of fact
18 generally arise after discovery is complete and the
19 parties then turn around and look and see what
20 they've got, and the admissions of fact are designed
21 primarily to avoid having to litigate those things
22 at trial.

1 So it's been my experience in the circuit court
2 that you can almost do admission of fact within 90
3 days before a hearing. I understand your problem.
4 Let's wait until the 16th on this issue.

5 MS. FRANCO-FEINBERG: That's fine.

6 JUDGE ZABAN: I'm not going to compel you nor am
7 I going to penalize you if you haven't answered
8 between now and the 16th. I want to wait for the
9 16th because I want to give Mr. Habib a chance to
10 talk to these people. I want to give the parties a
11 chance to exchange all the information and then we
12 can see exactly where we are.

13 And I think we are at point now where we've got
14 many loose ends, we will tighten them up and then we
15 will get ready for the hearing.

16 MS. FRANCO-FEINBERG: Your Honor, I believe
17 there is one issue regarding there was an
18 outstanding request for an extension of rebuttal
19 testimony. As I indicated, Com Ed is ready to
20 proceed and we don't believe that any further
21 testimony is required, and so that's an outstanding
22 request that National has made.

1 MR. HABIB: It's my understanding, and I've
2 actually never done a Commerce Commission hearing,
3 so my understanding is everything has to be in
4 writing before this, you want all this testimony set
5 forth and that's why I did the direct testimony of
6 their client, that was their response, et cetera.

7 As far as rebuttal testimony at this point,
8 what I'm looking at is this, I'm looking at those
9 two witnesses, plus in terms of your bill at this
10 point, as far as this sudden amendment at this point
11 as to why -- I'm looking at something that you
12 propounded, you gave us these corrected bills which
13 to me at least totally undercut the rebuttal
14 testimony that you had furnished at this point by in
15 effect saying, yes, suddenly, we did make a mistake
16 after all.

17 MS. FRANCO-FEINBERG: I just want to be clear
18 that Com Ed has not at any time stated that we agree
19 with National's position or that we've made a
20 mistake. Com Ed would request and we understand
21 that in light of the Hearing Examiner's order that
22 we have to provide information regarding our two

1 employees.

2 In light of -- we believe that rebuttal
3 testimony should be limited solely to those two
4 employees to the extent that National chooses to
5 call them. Any other rebuttal testimony could have
6 been presented pursuant to the original schedule on
7 April 26th.

8 To the extent that there are questions
9 regarding the 2000 credit, just as a background, one
10 of Com Ed's witnesses, Lynn Miller, analyzed the
11 bills in order to prepare her testimony, and
12 realized while looking at the bills that a credit
13 adjustment for 2000 would be appropriate. To the
14 extent that Mr. Habib believes that any testimony --
15 any issues relating to the 2000 bills are at issue,
16 which Com Ed does not believe that they are, the
17 party that provided the adjustment will be made
18 available at the hearing and Mr. Habib can cross
19 examine her to the extent that he believes
20 appropriate.

21 There are no fact issues that I understand can
22 be brought up, that's a direct testimony issue.

1 JUDGE ZABAN: Let me interrupt here. At this
2 point, I am not going to limit Mr. Habib, and I'm
3 going to tell you why. What happens if Mr. Habib
4 talks to these people and they provide him with some
5 additional witnesses or somebody else he wants to
6 call, it's really why we are doing this on the 15th.

7 On the 15th, I expect to have all discovery
8 complete, I expect Mr. Habib to tell me who his
9 rebuttal witnesses are. And I will consider them,
10 and decide whether I'm going to allow their
11 testimony or not allow their testimony, that's
12 number one.

13 Number two is, the truth of matter is, that Mr.
14 Habib chooses not to put his witness' testimony in
15 writing, I can't really block him from producing
16 them at trial. One of the reasons that you put
17 people in writing is it saves you having to do the
18 direct examination at these hearings, number one.
19 Number two, quite frankly as a lawyer I find having
20 a witness present his pretrial testimony a
21 disadvantage to the person who is presenting him,
22 and an advantage to the person who is actually able

1 to cross examine that witness because it gives you a
2 lot more time than the actual time of trial to be
3 able to go over their testimony.

4 So I think it actually inures to your benefit
5 to have him produce his testimony in writing.

6 That's a choice that you are going to have to make,
7 obviously. But other than the issues we discussed
8 here, which is you will provide him with the names,
9 you are going to provide Com Ed with the affidavit.
10 I will hold off on additional discovery until the
11 15th, and you will give me a report on what you
12 found.

13 As to the extension of time on presenting the
14 rebuttal testimony, I'm also going to hold on until
15 the 15th on that as well and we will make decisions
16 after we get a better opportunity. But I do want to
17 make this file, I think it is time to have a hearing
18 on it, I think the parties have to decide amongst
19 themselves what, if any, loose ends they've got and
20 have them all ready to go until the 15th.

21 So that's going to be the order, this matter
22 will be continued to May 15th at 10:30 for a final

1 final status hearing. Thank you all for playing.

2 (Whereupon the above-entitled

3 matter was continued to May 15th,

4 2002 at 10:30 a.m.)

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